Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband	)	CS Docket No. 02-52
Access to Internet Over Cable Facilities	)	

REPLY COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

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August 6, 2002

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The California Cable Television Association ("CCTA") files these reply comments to respond to the comments of California municipalities in the FCC's Notice of Proposed Rulemaking and to advise the Commission of the views of California operators on issues concerning local regulation of cable modem service put out for further comment by the FCC in March.[1] CCTA is a trade association representing cable television operators that serve over 7 million California cable television subscribers. CCTA's members have upgraded significant portions of their plant and serve hundreds of thousands of cable modem subscribers.

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* GN Docket No. 00-85, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking,* 17 FCC Rcd 4798 (Mar. 15, 2002) (cited herein, as appropriate, as *"Declaratory Ruling"* or "*Notice*").

CCTA was an active participant in the earlier comment round in this proceeding. CCTA's Reply Comments[2] were cited by the Commission several times in its Declaratory Ruling and Notice. First, CCTA was cited for providing to the FCC information about the multiple ISP access proceedings undertaken by California cities such as Fresno, Los Angeles and San Francisco. This assisted the Commission in understanding what was happening at the local level.[3] Again, at the point the Notice first begins to examine rights of way and franchising issues, it cites CCTA's concern over its ILEC competitors leveraging the local franchising process to seek both multiple ISP access and cable modem customer service and technical standards.[4]

CCTA's Reply Comments were also cited in the Notice as bringing to the FCC's attention the issue of how to handle previously paid franchise fees on cable modem service, and cable operators' potential exposure to refund liability. After citing CCTA, the FCC stated: "We understand that some cable operators, believing they were legitimately carrying out their obligations and rights under Title VI of the Act and local franchise agreements, collected franchise fees based on cable modem service revenues, identified these fees on subscriber bills, and remitted these franchise fees to local franchising authorities pursuant to the terms of their franchising agreements."[5] This led the Commission to propose to itself resolve such franchise fee issues based on national policy concerns, rather than relying on the courts to weigh the competing concerns at issue. It also led to the FCC giving guidance to any court hearing a refund claim that "cable operators

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[2] See Reply Comments of CCTA, GN Docket No. 00-185, filed January 10, 2001.

[3] Declaratory Ruling at 3, n. 9.

[4] Notice at 53, n. 347.

[5] Id. at 54, ¶106.

and franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service" prior to this March.[6]

INTRODUCTION AND SUMMARY

As CCTA noted during its prior participation in this proceeding, cable operators have been offering broadband Internet access in California since 1996. Much of the technology necessary to provide cable modem service comes from California companies, and cable's broadband deployment has significantly impacted California's economy.

Prior to the Ninth Circuit's finding two years ago in the Portland case that cable modem service is not a "cable service"[7] most California cable television operators did treat cable modem service as a cable service and paid franchise fees to local governments based on their cable modem service revenues. The Portland decision exacerbated the debate in California over whether and to what extent LFAs could regulate the provision of cable modem service consistent with federal Communications Act limitations. Notwithstanding the FCC's Declaratory Ruling in March, the initial comments filed in this docket this June by numerous California cities demonstrate that these questions are still highly contested.

For example, the City of Bakersfield argues that because local franchising authorities (LFAs) control their own rights of way, Bakersfield can charge "rent" as compensation for any use, collecting franchise fees from all income derived from any information service as well as any cable service delivered over the city's public rights of way. The joint comments by the Public Cable Television Authority (Orange County) and several other California cities, including San Diego, Berkeley and Santa Cruz, argue that (1)

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[6] Id. at 55 ¶107.

[7] AT&T v. City of Portland, 216 F.3d 871, 876-877 (9th Cir. 2000) ("Portland").

the FCC has no authority to preempt local regulation of the use of public rights of way to provide non-cable services, (2) a cable operator providing cable modem service requires a further local authorization beyond its basic cable franchise and (3) the Cable Act specifically LFA collection of additional fees on cable operators using the public rights way to provide non-cable services. This filing also argues that the FCC should not assert jurisdiction over the treatment of franchise fees paid on cable modem service prior to the effective date of its Declaratory Ruling.

The "City Coalition," which includes California city members of the San Mateo Telecommunications Authority, debates the FCC's ruling that cable modem service is not a "cable service." But, in the alternative, the Coalition argues that the classification of cable modem service as an "information service" does not limit a local government's authority to regulate its use of the public rights of way. The Sacramento Metropolitan Cable Television Commission argues that it should be able to adopt universal and uniform service requirements for cable modem services. Sacramento also argues that it should hold plenary authority over use of its rights of way and the regulation of cable broadband Internet customer service.

The persistence of California and other cities in pursuing greater regulatory authority over cable Internet offerings both in these comments and in their actions[8] demonstrates that the Commission needs to speak in definitive preemptive language. It must issue a clear order that tells all cities that, whether cable modem service is classified as a cable service, a telecommunications service, or an information service, local governments have no authority whatsoever to impose multiple ISP access requirements.

[8] See "Open Access Still Issue For AT&T-Comcast Transfer Application," Communications Daily, April 12, 2002.

Moreover, the FCC needs to clarify again for local governments that they cannot collect franchise fees from cable operators for cable modem service since it is not a cable service. To prevent unnecessary litigation, the FCC also needs to exercise its jurisdiction and tell the courts that refunds of such fees are not called for because these fees were collected by cable operators for the cities' coffers in the good faith belief that they were lawful.

The FCC also needs to stress to cities that cable operators do not need an additional local franchise to provide a non-cable interstate information service, cable modem service, that uses the same plant that has already been approved to traverse the city's public rights of way for delivery of cable services.

Finally, the FCC must clearly define the very narrow parameters of LFA jurisdiction over such areas as customer service, technical standards, and privacy in the offering of this interstate service.

I. The Multiple ISP Access Controversy In California Can Only Be Resolved If the FCC Articulates A Clear National Policy Prohibiting Local Governments From Imposing Such Requirements.

As the Commission's regular reports on ever-expanding broadband deployment[9] and the initial comments filed in June in this proceeding[10] demonstrate, cable operators, telephone companies and others, have invested billions of dollars to deploy new high-speed facilities and services throughout California and the rest of the country. The FCC has expressly recognized, for example, that "there is much evidence that Los Angeles County,

[9] See e.g., FCC July 23, 2002 Press Release subtitled "High Speed Connections to the Internet Increased 33% During the Second Half of 2001 for a Total of 12.8 Million Lines In Service."

[10] See, e.g., NCTA at 1, 16; Comcast at 7-11.

in addition to having a multitude of high-speed service providers, has an extremely competitive market for high-speed services."[11]

The benefits of the FCC's watchful waiting approach have been deployment of several broadband choices for California consumers. Not only has cable expanded its broadband infrastructure in California, but its principal DSL competitors, SBC and Verizon, have also expanded their offerings.[12] Nevertheless, California cable operators have been fighting with LFAs since at least 1998 over whether local governments should impose government-mandated access on cable modem facilities.

The issue first arose in the context of the AT&T/TCI system transfers, many of which took place in California. The disputes then spread as the proponents of municipally-required multiple ISP access, chiefly California's incumbent local exchange carriers (ILECs), Pacific Bell and Verizon, kept raising the issue as a means to improve their competitive position vis-à-vis cable, since they feared cable would become a competitive force not only in provision of the broadband Internet, but also in telephony.

As the FCC noted in the Declaratory Ruling, most California communities ultimately rejected regulating multiple ISP access to the cable plant at the instigation of one or both of cable's largest California telecommunications competitors, but only after several hearings.[13] Others, such as San Francisco, Los Angeles, and Fresno engaged in full

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[11] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Second Report ¶¶ 125, 115-130 (rel. Aug. 21, 2000).

[12] See "DSL SBC's Bright Spot," Multichannel News Daily, July 23, 2002.

[13] See Declaratory Ruling, pp. 3-4, fn. 9; see, e.g., City of Fresno City Manager's Office, "Report to Council on AT&T/Media One Merger – Open Access," at 2, 6-7 (May 11, 2000). ("Conclusion: The City should not insert itself into the middle of a competitive battle between two giant corporations for market share.").

administrative proceedings to examine whether to impose multi-ISP access requirements on cable operators as a condition on franchise transfers and renewals.[14]

This history illustrates the need for the FCC to clarify further the limits on local authority in this area. As then FCC Commissioner Powell warned three years ago: "whatever the answer to the question of mandated cable access is, I am skeptical that answer can be developed in hundreds of different ways by state and local franchise authorities. If … we see a contagion of different approaches proliferate throughout the country we will end up with an incoherent, disjointed policy melange that seems sure to impede the development of advanced services, in any form, for our citizens."[15]

As is evident from even a cursory review of the comments of California cities, and their continued desire for expansive regulatory authority over cable modem service, without a clear FCC articulation of the limits of municipal control over cable modem service, some cities will not only attempt to impose multiple ISP access requirements, but also attempt to expand their regulatory jurisdiction over all other aspects of that service. Title VI, as interpreted by the FCC and the courts, prescribes the limits of local authority over cable television service.[16] And, in California, the state public utility commission has plenary

[14] See e.g., City and County of San Francisco Department of Telecommunications and Information Services, "Open Access Report," January 14, 2000 and San Francisco City & County Resolution No. 00-020, January 26, 2000 (proposing a forced access plan to take place over a number of years); City of Los Angeles, Recommendation of IT&GS "To Require All Cable Franchises Open Access to ISPs," June 24, 2000 (supporting the imposition of nondiscriminatory access to the cable modem platform as part of the cable franchise renewal process).

[15] Speech before the Federal Communications Bar Association (Chicago Chapter), Chicago, Illinois, June 15, 1999.

[16] See, e.g., 47 U.S.C. § 521(1)-(3); MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000) ("Henrico").

jurisdiction over telephone companies and services.[17] As a result, California cities have only very limited jurisdiction over any form of electronic communications, particularly over Internet services.

Several California cities, as noted earlier, have nevertheless claimed the right to franchise cable modem service separately from cable service, even if cable modem service is defined as an information service. As demonstrated by the initial comments of NCTA and cable MSOs, ceding such authority to local government is contrary to the Act, prior FCC rulings, and the Commission's policy of encouraging broadband deployment and competition. [18]

Without clear limits on LFA authority, cable's ILEC competitors could continue to leverage the local regulatory process in order to hinder cable's ability to fight for market share in the increasingly competitive environment for broadband services.[19] SBC and Verizon are likely to continue this behavior because they, unlike cable, do not have any of their services regulated at the local level. Because they are regulated by the CPUC, the ILECs therefore have no fear of stimulating municipalities to take a more aggressive regulatory approach to broadband services offered by cable operators. Fights with LFAs over multiple ISP access could very well expand into numerous local franchising fights, again underwritten by cable's ILEC competitors, over customer service or technical

[17] Cal. Const. XII, Sec. 3; Cal. Pub. Util. Code § 7901.

[18] See, e.g., NCTA at 5-34; Comcast at 27-35.

[19] This phenomenon has been recognized not only in California, but also in other states like Florida. See e.g., Comcast Cablevision Broward County Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000) ("Broward County").

standards, even where such regulations have no real nexus with a community's "cable-related needs."[20]

Restricting local authority over cable modem service is consistent with the court cases that have invalidated required multiple ISP access ordinances.[21] The cable operator's First Amendment rights are at stake when government mandates multiple ISP access and therefore limits the operator's editorial discretion. Cable operators have designed a unique form of "press" by building additional bandwidth for Internet access and by deploying the technology necessary to provide customers with access to the Internet on the shared network. They also provide "speech" by adding content to the customer's Internet experience.[22]

Congress directed the FCC in Section 706(a) to take action to "accelerate deployment" of advanced telecommunications capability by "removing barriers" to investment and "promoting competition."[23] That mandate should spur the FCC to prevent local governments from imposing unwarranted regulation on cable operators' provision of cable modem service.

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[20] See 47 U.S.C. § 546. See Remarks of William E. Kennard, Chairman, Federal Communications Commission, before the National Cable Television Association, Chicago, Illinois, June 15, 1999 ("There are 30,000 local franchising authorities in the United States. If each and every one of them decided on their own technical standards for two-way communications on the cable infrastructure, there would be chaos. . . . The market would [then] be rocked with uncertainty: investment would be stymied. Consumers would be hurt.").

[21] See Broward County; Henrico; Portland.

[22] For a full discussion of the First Amendment implications of forced multiple ISP access requirements, see Comcast at 18-20.

[23] Pub. Law No. 104-104, § 706(a); see also Portland, 216 F.3d at 879-80 (deferring to the FCC on matters of communications policy).

II. The FCC Must Resolve The Franchise Fee And Tax Issues Raised By Municipalities.

Despite the FCC's March Declaratory Ruling, numerous cities filing Initial Comments still believe revenues from the provision of cable modem service are properly included in the revenue base on which cable operators should calculate franchise fees. They also argue that any questions as to the propriety of such fees, and any refunds of such fees, should be left to the courts to decide.

As noted above, prior to Portland, many California and other cable operators treated cable modem service as a cable service and paid franchise fees on gross revenues derived from that service. Federal law, however, makes it clear that franchise fees can only be imposed on cable services.[24] Thus, following Portland, at least in the Ninth Circuit, it became questionable whether franchise authorities could continue to impose, and operators could continue to collect or pay, franchise fees on cable modem service.

Continuing to collect franchise fees from subscribers and to pay franchise fees to LFAs in the face of the Portland holding that cable modem service is not a cable service

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[24] See 47 U.S.C. § 542(b). Moreover, the FCC's March Declaratory Ruling may trigger a provision of the California Internet Tax Freedom Act that states:

> A cable television franchise fee may not be imposed on Online Computer Services or Internet access delivered over a cable television system if the Federal Communications Commission, by issuing a final order, or a court of competent jurisdiction, by rendering a judgment enforceable in California, finds that those are not cable services as defined in Section 522(6) of Title 47 of the United States Code and are, therefore, not subject to a franchise fee. However, if that final order or judgment is overturned or modified by further administrative, legislative, or judicial action, that action shall control. The operation of this subdivision may be suspended by contract between a cable television franchising authority and a cable television operator.
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> Cal. Rev. & Tax. Code § 65004(c).

exposed both California cable operators and California LFAs to the risk of litigation.[25] As the FCC noted in the March Notice,[26] cable modem service subscribers in Virginia did file suit seeking a refund of franchise fees they paid on that service they claimed were unlawful. Fortunately, the Virginia court ultimately deferred to the FCC on the issue.[27] But if another court were to hold that the collection of such fees was unlawful, the LFA might have to refund the franchise fees the cable operator collected for the LFA so they could be returned to the cable operator's customers.

California and other cable operators were willing to continue paying franchise fees on cable modem service as long as it could arguably be a cable service. But some cable operators, particularly those in states in the 9th Circuit like California, felt it necessary to stop collecting franchise fees from subscribers and paying those fees to franchising authorities following the Portland decision.[28] Other cable operators have joined 9th Circuit operators since the FCC issued its Declaratory Ruling.[29]

California franchising authorities have had various responses. For example, Los Angeles County revised its monthly franchise fee statement so that operators could indicate

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[25] See Cal. Govt. Code § 53066(c) (limiting franchise fees to five percent of gross revenues); Cal Govt. Code § 53732 (prohibiting local government from imposing taxes beyond local authority); and Cal. Bus. & Prof. Code § 17200 (prohibiting illegal, deceptive, or unfair business practices). The FCC already has had to intervene to limit state consumer class action jurisdiction in California in the context of tier buy-through. See Petition for Order to Show Cause Against Cox Communications, Inc. For Violations of the Tier Buy-Through Provisions of the Cable Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order, 14 FCC Rcd 11716 (1999).

[26] Notice at 55 fn. 353.

[27] Bova v. Cox Communications, Inc., Civ. No. 7:01 CV 00090 (W.D.Va., July 10, 2002).

[28] See "AT&T seeks waiver of franchise fees on cable modem service," Communications Daily (Jan. 3, 2001) at 3.

[29] See "Cities Contest Cable Decision to Stop Modem Franchise Fees," Communications Daily, April 18, 2002.

whether they were paying franchise fees on cable modem service.[30] The City of Los Angeles tried to find alternative means to classify cable modem service to find a revenue substitute for franchise fees.[31]

Thus, the regulatory classification issues in this docket have a significant effect on California cable operators' past and potential future taxes and fees. If the FCC adopts a uniform federal structure to deal with cable franchise fee and other cable tax-related issues, this will encourage the availability of advanced telecommunications capability to all Americans and the removal of barriers to the adoption by consumers of services offered on cable broadband networks in a manner that carries out the policies promulgated by Congress in Section 706 of the 1996 Telecommunications Act.

In addition to Constitutional limits on local jurisdiction over cable Internet offerings, the FCC has authority to preempt local regulation because the FCC can meet its burden of showing that its regulatory goals under federal law (e.g., "removing barriers to infrastructure investment" and "promoting competition in the telecommunications market")[32] would be hampered by local customer service regulations, taxes or fees. The Commission must reaffirm its position that LFAs cannot impose franchise fees on revenues derived from cable modem service once the service has been classified as an information service, not a cable service, and send an even clearer signal to potential class action

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[30] Letter to Rob Moel, Time Warner, from Pastor Herrera, Jr., Director, County of Los Angeles, Department of Consumer Affairs, Re: Franchise Fees on Cable Broadband Service, Aug. 9, 2000.

[31] City of Los Angeles, Motion presented by City Councilman Nick Pacheco, "Recommendations to Institute Utility Users Tax as Revenue Alternative," Nov. 21, 2000. The City's utility user tax applies to telephone service and is levied at a rate of ten percent of a subscriber's bill. Los Angeles Municipal Code § 21.1.3(a).

[32] Telecommunications Act of 1996, Section 706 ("Advanced Telecommunications Incentives"); See Notice, ¶¶75-82. See also 47 U.S.C. §230(b)(2).

plaintiffs and their counsel that refunds of past franchise fees imposed in good faith on cable modem service are not required by law or sound public policy.

III. California's Technology Industry Leaders Want Cable To Continue To Be Free To Adopt The Market-Based Solutions California Cable Operators Are Implementing.

Cable MSOs operating in California are already demonstrating their commitment to market-based solutions for multiple ISP access to their facilities.[33] California's leading technology companies recognize the detrimental effect that government-mandated access regulation could have on broadband deployment, and thus have strongly advocated at the FCC against forced access.[34] This is not the time for the FCC to change what has been a consistent and fruitful course under two Chairmen.

CONCLUSION

For the reasons stated above, the FCC should finally resolve the so-called "open access" issue, firmly stating that local governments have no authority to require cable operators to provide access to multiple ISPs on their broadband plant. The Commission should also reaffirm that local governments (1) cannot collect franchise fees on cable Internet services, since cable modem service is an "information service," (2) cannot impose burdensome customer service or technical standards on this service, and (3) cannot require

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[33] See e.g., NCTA at 32-34, Comcast at 11-13; See also Comments of AT&T Broadband, Cox, and Time Warner Cable.

[34] See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Ex Parte Presentation on behalf of John Doerr of Kleiner Perkins Caufild & Byers (filed Dec. 21, 1998) (containing a letter dated December 9, 1998 from California-based industry executives to Chairman William E. Kennard regarding the deployment of competitive broadband networks).

a separate franchise for a cable operator to provide cable Internet service over the same rights of way over which it carries video services.

Respectfully submitted,

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